

AFFIN-ACF FINANCE BHD

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v.

LUM CHOON REALTY SDN BHD

HIGH COURT MALAYA, PENANG

b

RK NATHAN J

[COMPANIES WINDING-UP NO: 28-60-1992]

4 SEPTEMBER 2003

COMPANY LAW: *Winding-up - Winding-up order - Application to gazette and advertise order beyond 14-days requirement contrary to r. 34(1)(a) Companies Winding-Up Rules 1972 - Whether requirement mandatory - Whether valid reasons given for delay - Whether also there was a delay in service of copy of order to liquidator in breach of r. 34(1)(b) of Rules*

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This was the respondent's appeal against the decision of the senior assistant registrar ('SAR') who granted an "Order in Terms" in respect of the petitioner's application, *inter alia*, for extension of time to gazette and advertise the winding-up order against the respondent.

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Held:

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[1] The SAR ought to have been more careful and not simply grant "Order in Terms". This seemed meaningless when such an order sought to give meaning to prayer (c) of the petitioner's application. The order of the SAR ought to have been "Order in Terms of Prayers (a) & (b)". (p 503 b)

[2] The relevant rule governing gazetting and advertisement is r. 34(1)(a) of the Companies (Winding-Up) Rules 1972 ('Rules'). It is a mandatory rule that ought to be complied with. The petitioner did not comply with the said sub-rule within 14 days of the pronouncement of the order in open court and gave no valid reasons for the delay. Hence, this would prejudice the respondent. (pp 503 c-h & 504 a)

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[3] Rule 34(1)(b) of the Rules requires that the liquidator be served a copy of the winding-up order within 14 days of the pronouncement of such order. The liquidator herein was only served with the order 19 months after the due date for service. There was also no application for extension of time for this late service. Hence, the entire application was flawed. (p 504 b-c)

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[Appeal allowed with costs.]

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a Legislation referred to:

Companies (Winding-up) Rules 1972, r. 34(1)(a)

For the petitioner - John Clark Sumugod; M/s Sidek Teoh Wong & Dennis

For the respondent - Mahinder Singh Dulku (Harjit Singh); M/s Harjit Singh Sangay & Co

b For the official receiver - Anis Suraya

Reported by Usha Thiagarajah

JUDGMENT

c RK Nathan J:

Facts

The petitioner filed a winding-up petition against the respondent on 24 November 1992 and obtained an order on 3 August 2001. The respondent then appealed against the order of winding-up to the Court of Appeal. Soon thereafter the respondent also filed an application for stay of proceedings and the said application was set for hearing on 11 December 2001.

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Case For The Petitioner

However on 11 December 2001 when the said application came up for hearing, upon the directive of the court, the respondent withdrew the said application with liberty to file afresh which the respondent did on 22 March 2002. The court dismissed the said application on 27 August 2002. In the meantime by way of notice of change of solicitors, the present solicitors took over the conduct of this petition on behalf of the petitioner.

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f As the petitioner was desirous of proceeding with the petition it sought leave of the court to advertise and to gazette the winding-up of the company. The petitioner also averred that it was important that time be extended to enable it to exercise its rights against the respondent. The petitioner also averred that there was no prejudice to the respondent and that if there was such prejudice, it could easily be compensated with costs.

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Therefore, towards this end the petitioner applied by way of summons in chambers (encl. 108) before the learned senior assistant registrar (SAR) for the following orders:

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(a) that time be extended to enable the petitioner to advertise and to, gazette the winding-up order outside the time fixed;

(b) that the costs of this application be costs in the cause;

(c) such further or other relief that this court deems fit and proper.

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The learned SAR having heard arguments on encl. 108 granted an order in terms. Dissatisfied with that decision, the respondent appealed. Having heard arguments, I allowed the appeal with costs. a

Findings Of The Court

Firstly the learned SAR ought to have been more careful by not simply granting “order in terms”. This seems meaningless when such an order of the learned SAR is sought to give meaning to Prayer (c). The order of the learned SAR ought to have been order in terms of Prayers (a) & (b) . b

The relevant rule governing advertisement and gazetting is r. 34(1)(a) of the Companies (Winding-Up) Rules 1972. The said rule reads as follows: c

34(1) When an order is made for the winding-up of a company the petitioner shall forthwith inform the liquidator in Form 10 and within fourteen days of the pronouncement thereof:

- (a) gazette and advertise a notice in Form 12 of the making of the order; d
- (b) serve upon the liquidator a copy of the order; and
- (c) serve upon the Official Receiver and the Registrar of Companies a copy of order.

To my mind this is a mandatory rule that ought to have been complied with. Here the petitioner has not only breached r. 34(1)(a), the petitioner has also not complied with sub-sub (b). The order for winding-up was made on 3 August 2001. The petitioner ought to have, within fourteen days of the ‘pronouncement’ of the order by the judge in court complied with sub-sub r. (a). It is important to note that the rule does not even allow the fourteen days to commence from the sealing of the order. The fourteen days are to commence from the day the pronouncement is made by the judge in open court because all winding-up petitions are heard in open court. e
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If the petitioner was desirous of waiting until the respondent’s stay application was heard and disposed off, then the petitioner ought to have applied either by consent of parties for time to be extended, or the petitioner ought to have in any case proceeded to comply with sub-sub r. (a). The petitioner has given no valid reason for failing to comply with sub-sub r. (a). Its reason that in the event the stay was granted it would have expended unnecessary costs spent on the advertisement and gazetting is unacceptable. The petitioner could have asked for these costs in any event, upon the hearing of the respondent’s stay application and even if the respondent had succeeded in the stay application, g
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- a* the petitioner could have asked the court to exercise its discretion to grant it the said costs. The argument that there is no prejudice to the respondent is again flawed. The fourteen months delay in filing this application and giving no valid reasons for the delay, would cause prejudice to the respondent.
- b* As for breach of sub-sub r. (b), whilst the winding-up order was made on 3 August 2001 and whilst this sub-sub rule requires that the liquidator be served with a copy of the order within fourteen days of the pronouncement of such order, the liquidator who was present in court for this appeal, informed the court that the liquidator was only served with the order on 3 March 2003, that is nineteen months after the due date for service. There has been no
- c* application for extension of time of this late service.

The entire application is flawed, I therefore allowed the appeal with costs.

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